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Notes from the World War II Redress Trenches: The Disparate Treatment of Victims East and West

BARRY A. FISHER*

I. INTRODUCTION

As the twentieth century ended, Japan's former wartime allies, Germany and Austria, along with the principal Swiss banks, made efforts to close the historical book on their stained pasts. They settled the remaining claims of Holocaust victims for some \$7 billion, with acknowledgments and apologies for their past misdeeds. These settlements were the result of numerous U.S. court cases and multinational treaties, all of which I worked on, primarily between 1996 and 2000.

Although Europe has moved forward into the twenty-first century, Asia remains a prisoner of World War II and of its colonial past. Korea's division, an artifact of U.S.-Soviet power struggles, remains.¹ Japan continues to refuse to settle the claims of, or even apologize to, the victims of its wartime atrocities.² Instead, Japan has dragged the horrors of the last century into this new century, triggering dozens of cases in the United States, many of which I worked on, and also in Japan and South Korea.³

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1. Encyclopedia Britannica, Korea to c. 1400, <http://www.britannica.com/EBchecked/topic/693609/Korea> (last visited Nov. 23, 2009).

2. Karen Parker & Jennifer F. Chew, *Compensation for Japan's World War II War-Rape Victims*, 17 HASTINGS INT'L & COMP. L. REV. 497, 501 (1994).

3. Nicola Piper, *Transnational Women's Activism in Japan and Korea: The*

I want to briefly cover the Holocaust and Japanese cases I worked on and the interrelationships of these cases with political organizations, and advances by the international redress movement. I will further address the profound differences between the experiences of Japan's and Germany's victims. For example, Germany, with the encouragement of the United States, acknowledged its past and made some effort to compensate Holocaust victims.⁴ Even with the encouragement of the United States, however, Japan went in the opposite direction by opposing any apology and refusing to compensate its victims, fighting all lawsuits to the bitter end.⁵ These differences can be explained by cultural, psychological, historical, and political factors.

The road leading to the filing of the Japan wartime victims cases in the United States dates back to 1789 and the legislation of the first U.S. Congress.⁶ The road was further paved by the successful outcome of cases filed against Japan's wartime allies, Germany and Austria, along with the Swiss banks.⁷

Beginning in the 1980s, a growing number of U.S. courts recognized that the law of nations, both treaty and customary international law, could be enforced in the United States and the 1789 Alien Tort Statute allowed foreigners to file cases in U.S. courts as long as the defendant had a presence in the country.⁸ These cases have motivated the filing of an increasing number of human rights cases; for example, the Second Circuit's 1995 breakthrough ruling in the Serbia/Bosnia case of *Radovan*

Unresolved Issue of Military Sexual Slavery, 1 GLOBAL NETWORKS: A J. TRANSNAT'L AFF. 155, 165-66 (2001), available at <http://www3.interscience.wiley.com/cgi-bin/fulltext/118999793/PDFSTART>; History of the Korean Council for Women Drafted for Military Sexual Slavery by Japan, http://www.womenandwar.net/english/menu_012.php (last visited Dec. 17, 2009).

4. See WASHINGTON CONFERENCE ON HOLOCAUST-ERA ASSETS, NOV. 30-DEC. 3, 1998: PROCEEDINGS 101-03 (J.D. Bindenagel ed., 1999) [hereinafter PROCEEDINGS OF THE WASHINGTON CONFERENCE ON HOLOCAUST-ERA ASSETS].

5. See Yasukuni Shrine, *supra* note 1.

6. See, e.g., Alien Tort Statute, 28 U.S.C. § 1350 (2006) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

7. Ronald Bettauer, *Keynote Address: The Role of the United States Government in Recent Holocaust Claims Resolution*, 20 BERKELEY J. INT'L L. 1, 1-10 (2002).

8. See, e.g., *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (holding that a foreigner can file a claim under the Alien Tort Statute as long as the defendant has a presence in the United States).

Karadžić.⁹ The following year, after remarkable evidence regarding the involvement of the Swiss banks in the Holocaust surfaced, the first Holocaust victims case was filed.¹⁰ Shortly afterwards, Whittier Law School Professor Michael Bazylar hosted the first law conference on Holocaust litigation,¹¹ where I spoke about the non-Jewish victims of the Holocaust,¹² including Roma (so-called Gypsies), Jehovah's Witnesses, homosexuals, non-Jewish Poles, and other Slavs. I then met with, and subsequently joined, the negotiation and litigation teams of the Swiss bank cases.

The Swiss banks settled for \$1.25 billion in 1998,¹³ and many cases were filed against German and Austrian banks, insurance firms, and industrial companies shortly afterwards.¹⁴ The U.S. State Department hosted a Holocaust claims conference for forty-four nations in 1998.¹⁵ Under then Deputy Treasury Secretary Stuart Eizenstat's leadership, eleven-nation negotiations with Germany and Austria took place over the next two years. I was on the negotiation team and was a signatory to the resulting Holocaust Claims settlement treaty with Germany and Austria;¹⁶ reached just before the end of the Clinton administration in 2000. The Austrian and German treaties were completed after the turn of the century, and a number of court cases continued, including insurance and looted art, as well as claims processing, in which I am involved to this date.

As the German and Austrian issues were being settled, I made contact in the last months of 1999 with Asian victim

9. *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996) (holding that the plaintiffs sufficiently alleged violations of customary international law and law of war for purposes of the Alien Tort Statue).

10. *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000).

11. See Barry A. Fisher et al., *What Happens Next?*, 20 WHITTIER L. REV. 91 (1998).

12. See Barry A. Fisher, *No Roads Lead to Rom: The Fate of the Romani People Under the Nazis and in Post-War Restitution*, 20 WHITTIER L. REV. 513 (1999).

13. *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d at 141 (approving the settlement that was filed beginning in late 1996).

14. Burt Neuborne, *Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement*, 58 N.Y.U. ANN. SURV. AM. L. 615, 616-17 (2003).

15. PROCEEDINGS OF THE WASHINGTON CONFERENCE ON HOLOCAUST-ERA ASSETS, *supra* note 4.

16. Joint Settlement Statement on Holocaust Restitution, January 2001, <http://www.bmeia.gv.at/en/embassy/tel-aviv/news/joint-settlement-statement-on-holocaust-restitution-january-2001.html> (last visited Nov. 2, 2009).

organizations in the U.S. and Asia, particularly Chinese and Korean groups. That year I began traveling to Japan and Korea to meet with lawyers, organizations, and victims, and I was the only American speaker invited to a major international conference in Tokyo in December 1999 on wartime victim issues.¹⁷ I flew from that conference to Berlin just before Christmas where we had a major breakthrough with Germany and publicly announced the settlement in a ceremony with Secretary of State Madeline Albright and German Foreign Minister Joschka Fischer.¹⁸

At the beginning of 2000, I met with victims, lawyers, and academics in Beijing. No victim organizations were allowed. There had been no government approval of academic work or conferences up to the, but, within two months of my meetings, a university in Shanghai was permitted to hold an international conference on the "Comfort Women" issues.¹⁹ I was the only American invited to speak. At the conference, I met victims and victims organization leaders from many countries, including Australia, the Netherlands, Taiwan, North and South Korea, the Philippines, and Indonesia. I met there with North Koreans who later agreed to cooperate with witnesses and evidence in the U.S. cases I was involved with, particularly *Jae Won Jeong v. Taiheiyo Cement Corp.*, which concerned a Korean-American citizen who was a Japanese slave laborer during the war in what is now North Korea, enjoyed the most, albeit temporary, success.²⁰

17. See INT'L CITIZENS' FORUM ON WAR CRIMES AND REDRESS, SEEKING RECONCILIATION AND PEACE FOR THE 21ST CENTURY (1999), available at <http://www.springerlink.com/content/75f54glfn9c80ub/fulltext.pdf>.

18. See Carol J. Williams, *Germany Pledges \$5.2 Billion for Slave Laborers*, L.A. TIMES, Dec. 18, 1999, at A4.

19. See JENNIFER CHAN-TIBERGHIE, GENDER AND HUMAN RIGHTS POLITICS IN JAPAN: GLOBAL NORMS AND DOMESTIC NETWORKS 160 (2004).

20. *Taiheiyo Cement Corp. v. Superior Court*, 117 Cal. App. 4th 380, *aff'd* 12 Cal. Rptr. 3d 32 (2004), *cert. denied sub nom. Jae Won Jeong v. Taiheiyo Cement Corp.*, 543 U.S. 1089 (2005). Jae Won Jeong was a Korean student in Japan during the war. Refusing to join the Japanese military, Jeong was captured and taken to a slave labor camp which was operated by a Japanese conglomerate, Onoda, in what is now North Korea. After the war, the company operated internationally, including in Los Angeles where Jeong ultimately emigrated. Jeong's case, which sought compensation from Onoda under California labor laws, was filed in state court in Los Angeles. *Jeong v. Onoda Cement Co. Ltd.*, No. BC217805, 2001 WL 1772750, at *1 (Cal. Superior Ct., Sept. 14, 2001). I led the legal team.

A couple of days before a motion to dismiss was to be heard, the Justice Department announced that one of its attorneys would be flown to Los Angeles in order to argue for a

There were about 100 U.S. Holocaust-related cases; some, such as art looting, are still pending. The near 100 Japanese-related cases in the U.S. have seen limited successes, such as *Jeong*, not to speak of the myriad of cases in Japan which I have written about,²¹ as well as cases in Korea. What I would like to do is give some background of the still unredressed victims of Japan and then give some details of the litigation in the U.S. and Japan by focusing on one of the many types of victim cases, the sexual slavery cases – what the Japanese euphemistically called the “Comfort Women” – and finally give some taste of the Comfort Women’s role in political organizing and the redress movement.

The purpose of this article, however, is to provide some background on the still unredressed victims of Japan, as well as explain some details of the litigation taking place in the United States and Japan involving these victims. These issues are explored by focusing on sexual slavery cases or what the Japanese euphemistically called the “Comfort Women”, and the role of Comfort Women in politics and the redress movement.

dismissal. That was extraordinary because it was shortly after September 11, and there were few flights in operation and the government had not filed any papers with the court. After a lengthy and heated argument, Judge Peter D. Lichtman denied the motion to dismiss. *Id.* at *10. Judge Lichtman had been on a list for possible appointments to a federal judgeship, but was thereafter removed from consideration as a consequence. See *End of the Month*, METROPOLITAN NEWS ENTERPRISE (L.A.), Mar. 29, 2002, <http://www.metnews.com/endmomarch02.html>.

Despite his removal, however, Judge Lichtman granted Jeong’s motion for discovery of Onoda’s historical documents in Japan. No prior similar cases in the United States or Japan had allowed such discovery. Aided by my network of cooperating Japanese lawyers on the redress cases, we were able to do the discovery.

Jeong won in the court of appeal on a writ taken by the company. *Taiheiyo Cement Corp. v. Superior Court*, 129 Cal. Rptr. 2d 451, 472 (Ct. App. 2003). However, the decision was subsequently reversed on remand because of the U.S. Supreme Court decision in *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003). *Taiheiyo Cement*, 117 Cal. App. 4th at 398.

There is another historic aspect about the case. After meeting North Koreans at the 2000 Comfort Women conference in Shanghai, I opened dialogue with them about cooperating in the *Jeong* case by allowing me access to witnesses and experts since Jeong’s slave labor had taken place in what is now North Korea. While North Korea had refused to cooperate with the lawyers on the cases pending in Japan, they did agree with me and invited me to meet other victims of Onoda at the site where Jeong had been held and to meet experts. If the case had ever gone to trial it would have been an interesting challenge to convince the government to allow the witnesses and experts to testify.

21. See, e.g., Barry A. Fisher, *Japan’s Postwar Compensation Litigation*, 22 WHITTIER L. REV. 35 (2000).

II. HISTORICAL BACKGROUND

Japan's Asian-Pacific War, which ultimately spread over most of that vast region, began with Japan's 1931 invasion of China, later merged with World War II, and ended with Japan's surrender in 1945.²² The 1931 invasion was staged from the Korean peninsula, which Japan had taken control of twenty-five years earlier, in 1905.²³ The 1905 Portsmouth Treaty, for which U.S. President Theodore Roosevelt was awarded the Nobel Peace Prize, ended the Russo-Japanese War and granted Japan control of Korea in exchange for Japan's agreement not to interfere with the United States' control of the Philippines.²⁴

During Japan's campaign of aggression in the first half of the twentieth century, Japan forced thousands of Chinese, Koreans, and other individuals into slave labor and sexual slavery under the euphemism of Comfort Women.²⁵ Japan subjected populations to biological and chemical warfare, medical experiments, massacres, mass rapes, wholesale looting, and displacement.²⁶ Japan also engaged in ethnic cleansing by imposing the Japanese language, religion, and culture on Koreans.²⁷ Japan's sexual slavery program spanned thirteen years, beginning after the 1932 Shanghai Incident and accelerating after the 1937 Rape of Nanking. The program finally ended in 1945.²⁸

In massive slave ship operations of a scope unseen since the African slave trade, Japanese ships carrying millions of women, children, and men as prisoners of war (POWs) from Korea, China, the Philippines, Burma, the Dutch East Indies, and elsewhere, crisscrossed the vast Pacific region that Japan controlled.²⁹ They were taken to wherever sex slaves and laborers were needed,

22. Y. Frank Chiang, *One-China Policy and Taiwan*, 28 FORDHAM INT'L L.J. 1, 12-14 (2004).

23. Treaty of Portsmouth, Japan- Russ., Sept. 5, 1905 *reprinted in*, MAJOR PEACE TREATIES OF MODERN HISTORY 1648-1967, at 1149, 1150 (Fred L. Israel ed. 1967) (granting Japan political, military, and economical interests over Korea).

24. *Id.*

25. Parker & Chew, *supra* note 2, at 498.

26. *Id.* at 507-10.

27. Jungmin Seo, *Politics of Memory in Korea and China: Remembering the Comfort Women and the Nanjing Massacre*, 30 NEW POL. SCI. 369, 374 n.24 (2008).

28. Etsuro Totsuka, *Commentary on a Victory for "Comfort Women": Japan's Judicial Recognition of Military Sexual Slavery*, 8 PAC. RIM. L. & POL'Y J. 47, 47-48 (1999).

29. Yasukuni Shrine, *supra* note 1.

including factories, coal mines, military installations, and brothels.³⁰ At least 200,000 women were kept in brothels, and thousands of other women were captured and kept as sex slaves in front-line units and, like other captives, were killed when no longer “useful.”³¹

III. SETTING THE STAGE FOR THE COMFORT WOMEN CASES: HISTORICAL, CULTURAL, AND POLITICAL ROADBLOCKS

Unlike the wartime victims of Germany and Austria, Japan’s victims, including the Comfort Women, hit a wall in their efforts to attain redress. Japan’s culture and psychology in concordance with U.S. politics and history, including the Bush administration’s “imperial presidency” tactics, made all the difference. The following sections begin by describing what happened in the United States and Japanese Comfort Women cases and then discuss the influence of Japanese culture and psychology, as well as U.S. politics and history over the outcome of these cases.

IV. JAPANESE COMFORT WOMEN LITIGATION

The confluence of public awareness, document disclosures, mobilization by newly formed victim groups after the death of Emperor Hirohito in 1989, and the formation of the Korean Council for the Women Drafted for Military Sexual Slavery in 1990, led three elderly Korean women to file suit in the Tokyo District Court in 1991. The courageous Kim Hak-Sun was the first victim to step forward.³² Two of the cases settled in part, and the court awarded some relief in the third case, which was later reversed on appeal.³³

These cases built momentum and notoriety in Japan, and led to growing numbers of victim support groups and efforts to achieve a resolution in the Japanese legislature.³⁴ The research

30. *Id.*

31. See YOSHIMI YOSHIAKI, COMFORT WOMEN: SEXUAL SLAVERY IN THE JAPANESE MILITARY DURING WORLD WAR II 91-94 (Suzanne O’Brien trans., Columbia Univ. Press 2000) (1995); see also Janet L. Tonguthi, “Comfort Women” of World War II, 4 UCLA WOMEN’S L.J. 413, 415 (1994).

32. Fisher, *supra* note 21; Parker & Chew, *supra* note 2, at 502.

33. See Taihei Okada, *The “Comfort Women” Case*: Judgment of April 27, 1998, Shimonoseki Branch, Yamaguchi Prefectural Court, Japan, 8 PAC. RIM L. & POL’Y J. 63, 64 (1999).

34. See Parker & Chew, *supra* note 2, at 499-500.

done by the noted Japanese historian, Professor Yoshiaki Yoshimi, was of particular importance. Professor Yoshimi uncovered numerous significant documents in Japan,³⁵ making his findings public in 1993, and publishing the English translation of his seminal text in 1995.³⁶

Beginning in 1991, approximately one hundred cases were filed in Japan by sex slaves, slave laborers, tortured POWs, as well as victims of the Nanjing Massacre, biological and chemical warfare, and medical experiments performed by the Japanese.³⁷ The plaintiffs' countries of origin included South Korea, China, Taiwan, the Philippines, the United States, Australia, and the Netherlands.³⁸

In theory, Japanese courts might have been fertile ground for these kinds of cases. Under Japanese law, treaties have the force of law and are self-executing. That is, treaties do not need implementing legislation in order to be enforced, unless provided otherwise.³⁹ However, in practice, Japanese courts have not embraced these types of claims, as have been successive Japanese ruling parties, legislatures, and prime ministers.⁴⁰ Over the last sixteen years, during which some eighty cases have been filed by victims in Japanese courts, no case has been successful through the appeal process. There have been, however, a few notable and highly controversial settlements, including *Kajima*, a Chinese slave labor case.⁴¹ For example, one Korean Comfort Women case, four Chinese slave labor cases, and one Korean returnee case were successful in the district court, but were reversed on appeal. Additionally, two Chinese and three Korean slave labor cases have reached settlements with Japanese companies.⁴²

35. *Id.* at 502.

36. YOSHIKAKI, *supra* note 31.

37. See Parker & Chew, *supra* note 2, at 498-500.

38. See *id.* at 498-99 n.4; Yvonne Park Hsu, "Comfort Women" from Korea: Japan's World War II Sex Slaves and the Legitimacy of their Claims for Reparations, 2 PAC. RIM L. & POL'Y J. 97, 103-105 (1993).

39. Kenneth L. Port, *The Japanese International Law "Revolution": International Human Rights Law and Its Impact on Japan*, 28 STAN. J. INT'L L. 139, 152-53 (1991).

40. See Parker & Chew, *supra* note 2, at 500-01.

41. Geng Zhun v. Kajima, 988 HANREI TAIMUZU 250 (Tokyo D. Ct., Dec. 12, 1997); see Timothy Webster, Note, *Sisyphus is a Coal Mine: Responses to Slave Labor in Japan and the United States*, 91 CORNELL L. REV. 733, 748-49 (2006) (discussing the merits of the case).

42. See Webster, *supra* note 41, at 747, 748 n.115; Takashi Yoshia, *Historiography of*

When the first Comfort Women cases were filed in 1991, the Japanese government's first response was to deny the government's involvement.⁴³ When the government's involvement was proven in 1992, the government next claimed that the women had been volunteers.⁴⁴ The government admitted this was untrue, however, in 1993.⁴⁵ Nevertheless, Japan used all of its power to defeat the court cases of these now elderly victims.⁴⁶

V. UNITED STATES COMFORT WOMEN LITIGATION

As mentioned above, the road leading to the filing of Japan wartime victims cases in the U.S., including the Comfort Women cases, was made possible because of successful litigation against Japan's ally, Germany.

At the beginning of 2000 I met with victims, lawyers, and academics in Beijing. The Chinese government did not allow victim organizations at the meetings in early 2000, but within two months of my meetings, a university in Shanghai was permitted to hold an international conference on the Comfort Women issues.⁴⁷ I was the only American invited to speak. At the conference I met North Koreans who later agreed to cooperate with witnesses and evidence in the U.S. cases I was involved with. I also met victims and victims organization leaders from many countries, including Australia, Netherlands, Taiwan, North and South Korea, the Philippines, and New Guinea.

I began working with Comfort Women groups, particularly those in South Korea, Taiwan, and the Philippines, and with lawyers and scholars in China preparing a Comfort Women case to be filed in the U.S. against Japan. I had them send victim

the Asia-Pacific War in Japan, ONLINE ENCYCLOPEDIA OF MASS VIOLENCE, June 3, 2008, at 8, http://www.massviolence.org/PdfVersion?id_article=151 (last visited March 3, 2010).

43. Parker & Chew, *supra* note 2, at 500.

44. Tongsuthi, *supra* note 31, at 415.

45. *Id.*

46. See Webster, *supra* note 41, at 753-54 (discussing the statute of limitations and government immunity are the two most successful defenses by the Japanese government in the forced labor context).

47. See Hayashi Hirofumi, Address at the International Symposium on Chinese "Comfort Women": Japanese Military Comfort Houses and Overseas Chinese "Comfort Women" in South-East Asia (Mar. 30, 2000) (summary available at <http://www32.ocn.ne.jp/~modernh/eng05.htm>).

statements to review, and I began research. I decided to file in Washington, D.C. federal court, and organized a legal team that included Michael Hausfeld, a prominent Washington lawyer with whom I had worked in Holocaust cases and other Japan wartime slave labor cases. To help coordinate with victims, I worked with groups including the worldwide Chinese group "Global Alliance for Preserving History of World War II in Asia." I also worked with Korean groups, including "The Korean Council for the Women Drafted for Military Sexual Slavery by Japan" and "House of Sharing", and the Filipino organizations "Lila-Pilipina" and the "Asian Centre for Women's Human Rights."

I picked 15 representative women as plaintiffs for the case: six Korean, four Chinese, four Filipina and one Taiwanese, on behalf of themselves and other Comfort Women. The case, *Hwang Geum Joo v. Japan*,⁴⁸ was filed on a historically significant date, September 18, the same day Japan invaded China.⁴⁹ The day the case was filed, we held a press conference at the National Press Club in Washington with representatives of the groups that assisted and with the Washington Coalition for Comfort Women. A mass demonstration at the Japanese Embassy followed the press conference.

The case required the analysis and interpretation of the 1952 Peace Treaty between Japan, the United States, and many other countries that ended the war, as well as the 1965 treaty between South Korea and Japan, and other legal sources. There were difficulties in obtaining documents and supportive positions from the Korean government and other authorities.

The case sought money damages for the womens' subjection to sexual slavery and torture before and during World War II.⁵⁰ The former Comfort Women alleged that, between 1931 and 1945, the Japanese government abducted, coerced or deceived them and a large number of other girls and women from occupied territories

48. *Hwang Geum Joo v. Japan*, 172 F.Supp.2d 52 (D.D.C. 2001), *vacated*, 542 U.S. 901 (2004).

49. *Hwang Geum Joo, et al. v. Japan*, No. 1:00-cv-02233-HHK (D.D.C. filed Sep. 18, 2000); U.S. Holocaust Memorial Museum, World War II: Timeline, <http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10007306> (last visited Dec. 18, 2009).

50. Statement of Interest of The United States of America, *Hwang Geum Joo, et al. v. Japan*, 172 F.Supp.2d 52 (D.D.C. 2001) (No. 00-CV-2288) *available at* <http://www.cja.org/article.php?id=328>.

to server as Comfort Women at comfort stations near the front-lines of the war. At the comfort stations, they were routinely raped, tortured, beaten, mutilated, and in some cases murdered.⁵¹ The victims asserted that these comfort stations were operated by the Japanese army, which charged soldiers a fee for access to the women.⁵²

The lawsuit was filed under the Alien Tort Statute, which grants non-U.S. citizens jurisdiction to U.S. federal courts in order to recover for torts “committed in violation of the law of nations or a treaty” of the United States.⁵³ The statute allows non-U.S. citizens to sue other non-U.S. entities as long as the U.S. federal courts can obtain jurisdiction over the person or entity sued.⁵⁴ Japan is considered “present” in the United States because of its continuous activities, for example, running an embassy and consulates within the United States. For this reason, Japan can be sued in the United States, if all of the other conditions are met.⁵⁵

In every redress case that was filed in the United States, including slave labor cases brought by American POWs, Filipinos, the Chinese, Koreans, and Comfort Women against Japanese companies, the U.S. government immediately filed Statements of Interest demanding that the cases be dismissed.⁵⁶ The U.S. argued that the court’s involvement would interfere with U.S. treaty commitments and foreign policy.⁵⁷ The U.S. government took the opposite position, however, in the U.S. Holocaust lawsuits. There, the U.S. government was actively engaged in negotiating settlements that required substantial payments from Germany.⁵⁸

In response to the U.S. government’s Statements of Interest, the federal court for the District of Columbia held in *Hwang* that Japan was immune from suit, pursuant to the Foreign Sovereign

51. *Id.*

52. *Joo*, 172 F. Supp. 2d 52, 55-56.

53. 28 U.S.C. § 1350 (2006).

54. *See Filártiga v. Peña-Irala*, 630 F.2d 876, 878 (2d Cir. 1980).

55. *See Joo*, 172 F. Supp. 2d at 52.

56. Barry A. Fisher & Iris Chang, *With U.S. Collusion, Japan Shuttters Its Past*, L.A. TIMES, July 31, 2001 at B13.

57. *See* Statement of Interest of The United States of America, *Hwang Geum Joo, et al. v. Japan*, 172 F.Supp.2d 52 (D.D.C. 2001) (No. 00-CV-2288) available at <http://www.cja.org/article.php?id=328>.

58. Fisher & Chang, *supra* note 56.

Immunities Act of 1976 (FSIA).⁵⁹ The FSIA grants immunity from suit to foreign states, subject to several important exceptions.⁶⁰ The main exception occurs when a foreign state's commercial activities has an effect in the United States.⁶¹ The Comfort Women case arguably fell under this exception because the Comfort Women were taken from the Philippines and other U.S. territories. The court dismissed the Comfort Women case, holding that none of the exceptions to the FSIA applied and that the case raised a political question not within the jurisdiction of the courts.⁶²

The Comfort Women appealed, and the appellate court affirmed the dismissal on a different ground. The appellate court noted that the commercial activity exception did not come into being until 1951, and the actions in this case happened before that year. Therefore, the appellate court found no exception to Japan's right to sovereign immunity.⁶³

The Comfort Women appealed to the U.S. Supreme Court. While the appeal was pending, the U.S. Supreme Court, in a case involving six Gustav Klimt paintings that were taken by Austria in violation of international law, held that the 1976 law on sovereign immunity applies regardless of when the underlying conduct occurred.⁶⁴ The U.S. Supreme Court then granted review of the Comfort Women case, and sent it back to the appellate court in June 2004 for reconsideration.⁶⁵

The appellate court again affirmed the dismissal, focusing on the political question issue previously argued by the lower court. The appellate court held that, given the 1951 Peace Treaty with Japan, the court had to defer to the judgment of the executive branch of the U.S. government, which had averred that a court case would intrude upon the relations between Japan and other foreign governments, and impinge upon the ability of the President of the United States to conduct foreign relations.⁶⁶ The appellate court further noted that the 1951 Peace Treaty included

59. *Joo*, 172 F. Supp. 2d at 58-64.

60. 28 U.S.C. §§ 1602-1611 (2006).

61. *Joo*, 172 F. Supp. 2d at 61-64.

62. *Id.* at 67.

63. *See Hwang Geum Joo v. Japan*, 332 F.3d 679, 687 (D.C. Cir. 2003), *vacated*, 542 U.S. 901 (2004).

64. *Republic of Austria v. Altmann*, 541 U.S. 677, 697-99 (2004).

65. *Hwang Geum Joo v. Japan*, 542 U.S. 901, 901 (2004).

66. *Hwang Geum Joo v. Japan*, 413 F.3d 45, 48-53 (D.C. Cir. 2005).

a waiver of claims by American nationals against Japan and its nationals, and that “it manifestly was not the intent of the [U.S.] President and Congress to preclude Americans from bringing their war-related claims against Japan . . . while allowing federal or state courts to serve as a venue for the litigation of similar claims by non-U.S. nationals.”⁶⁷

The Comfort Women again appealed to the U.S. Supreme Court. In February 2006, however, the Supreme Court refused to hear the case.⁶⁸ At this point, the case was over.

The Comfort Women case was not the only U.S. lawsuit arising out of the war crimes committed by Japanese entities during World War II. Other cases included claims for slave labor and atrocious injuries against Onoda Cement Company,⁶⁹ as well as Mitsubishi, Mitsui, Nippon Steel, and many other companies.⁷⁰ These cases were ultimately dismissed by the courts.⁷¹

The U.S. relationship with Japan and postwar history also coincided with the Bush administration’s political agenda, which arguably affected the outcome of the Japanese redress cases. The Bush administration attempted to create an “imperial presidency” by flexing its executive power muscles and expanding them as much as possible.⁷² The Bush administration embraced this approach in the Japanese redress cases. In *Onoda Cement* and *Hwang*, for example, the Bush administration reversed the U.S. government’s position in the Holocaust cases that were pending during the Clinton years, asserting that it could render the cases non-justiciable, or not subject to court review, because a court could not entertain the case without interfering with foreign policy and U.S. treaty commitments.⁷³ The precedents established by the Japanese redress cases have led to similar types of cases being

67. *Id.* at 50 (internal quotations omitted).

68. *Hwang Geum Joo v. Japan*, 546 U.S. 1208, 1208 (2006).

69. See *Taiheiyo Cement*, 117 Cal. App. 4th at 386 (involving suit against Onoda Cement Company in order to recover compensatory damages for unpaid labor and personal injuries suffered while enslaved by the Japanese-run company during World War II).

70. *Deutsch v. Turner Corp.*, 324 F.3d 692, 692-97 (9th Cir. 2003), *cert. denied*, 540 U.S. 820 (2003).

71. *Id.* at 719.

72. See Melissa K. Mathews, *Restoring the Imperial Presidency: An Examination of President Bush’s New Emergency Powers*, 23 HAMLINE J. PUB. L. & POL’Y 455 (2002).

73. *Yasukuni Shrine*, *supra* note 1.

dismissed. For instance, a California statute for recovery of Holocaust-era looted art was preempted by the executive branch's exclusive foreign affairs power,⁷⁴ and an executive policy that was divined from some public statements was enough to preempt another California law recognizing insurance claims of Armenian Genocide victims.⁷⁵

The role of the United States in all of these cases cannot be understated. While the executive position, expressed through both the Departments of State and Justice, was to pressure settlements from Germany, Austria, and Switzerland, the United States joined Japan's side, demanding dismissal in every case.⁷⁶ The author of *Rape of Nanking*, Iris Chang, and I wrote in a commentary for the L.A. Times that when Japanese redress cases, in particular the Comfort Women case, were filed in 2000, "[t]hese women expected the U.S. government to view their claims with sympathy and to help them negotiate a resolution with Japan."⁷⁷ Although the United States supported international laws against sexual human trafficking and women's rights in international fora, it applied a double standard by turning its back on Asian victims while supporting European ones.⁷⁸ Ms. Chang and I conclude that this stance further damaged the image of the United States at a time when the nation already had a "fractured image as a global advocate for human rights."⁷⁹

VI. WHY THE DISPARITY BETWEEN JAPANESE AND GERMAN TREATMENT OF VICTIMS IN THE POST-WAR PERIOD?

An ancient truth is that history is written by the victors. Post-war Pacific history, however, provides a twist on this adage. When it became clear that Communist States would seek dominance in Asia after the creation of North Korea in 1948 and the proclamation of the People's Republic of China in 1949, America acknowledged the importance of its alliance with Japan. The Japanese defeat of 1945 and Japan's unconditional surrender,

74. *Von Saher v. Norton Simon Museum of Art*, 578 F.3d 1016, 1025-27 (9th Cir. 2009).

75. *Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052, 1057-63 (9th Cir. 2009).

76. *Yasukuni Shrine*, *supra* note 1.

77. *Fisher & Chang*, *supra* note 56.

78. *Id.*

79. *Id.*

through a process of diplomatic alchemy, transformed into lasting prosperity.⁸⁰ Just a few years after its abject loss, Japan stood as the linchpin of the American plan for security in the Pacific. America further required Japan to take the most minimal steps, primarily during the immediate aftermath of the war, toward recognizing its past and the unimaginable devastation it wrought across Korea, China, and elsewhere.

After the war, the United States pressured Germany to teach its children the atrocities of the Holocaust, encourage trips to concentration camps, and to apologize and pay restitution to its victims. There was no such pressure on Japan to do the same for Japan's victims, many of whom were located in enemy Communist countries during the Cold War.⁸¹ Homage should be paid to those countries.

While few facts of twentieth century Asian history are included in American textbooks, Japanese textbooks often indulged in outright falsification. This provokes protests from Japan's former Pacific empire, but silence from the United States and other Western governments.⁸²

This controversy should persuade the Japanese government to take a more honest look at its nation's recent past and change Japanese textbooks to reflect this past. The responses from Japanese government leaders, however, have been feeble at best. For example, the activities of the redress movement in 1993, particularly after the filing of the Comfort Women cases in Japan, prompted Prime Minister Hosokawa Morihiro's statement of regret for what he called Japan's "mistaken war."⁸³ Conservatives, especially the long-dominant Liberal Democratic Party (LDP), immediately attacked Prime Minister Morihiro for making this statement.⁸⁴ Japanese legislators also formed a group in 1995 in order to publish a volume of essays justifying the so-called Great East Asian War and attacking the accounts of Japanese wartime atrocities, including the Nanking Massacre, as lies.⁸⁵

Private individuals and groups in Japan, including the "Free

80. Yasukuni Shrine, *supra* note 1.

81. *Id.*

82. *Id.*

83. YOSHIKI, *supra* note 31, at 3.

84. *Id.*

85. *Id.* at 3-4.

History" (*jiyūshugishi*) advocates led by Professor Fujioka Nobukatsu of the University of Tokyo,⁸⁶ also came forward to support the proposition that "there is little historical proof of many Japanese war crimes and no need for Japan to apologize."⁸⁷ This movement has grown over the last decade, and the controversy over the historical facts has removed what little historical accuracy Japanese school books previously contained.⁸⁸ There has also been increasing support for right-wing sentiments regarding the Yasukuni Shrine, Japanese rearmament, and the rejection of the victim redress movement.⁸⁹ Japanese politicians, including former Prime Minister Shinzo Abe, have long lauded as a hero one of eleven Allied judges, Judge Radhabinod Pal of Indian descent, who would have exonerated Japan's top wartime leaders of war crimes.⁹⁰ A monument of Judge Pal stands at Yasukuni Shrine.⁹¹

Japanese actions violated a 1996 international commitment to disclose the historical facts of Japan's wartime aggression in the nation's textbooks.⁹² In 2001, when Japanese books were again being revised and a storm of protests erupted in South Korea, China, and elsewhere, one author of the "New History Textbook," Akinori Takamori, passed off the protest as a South Korean "obsession with selfish, narrow-minded nationalism," and, in the style of Holocaust deniers, said that he had hoped to see "more respect for diverse interpretations of history."⁹³

While American educational reforms introduced by U.S. authorities were supposed to guarantee the editorial independence of Japanese textbooks, the textbooks were increasingly censored by Japan's Ministry of Education.⁹⁴ The Ministry eliminated, for example, references to the Nanking Massacre, the mass rape of

86. *Id.* at 4.

87. *Id.*

88. Yasukuni Shrine, *supra* note 1.

89. *Id.*

90. *Id.*

91. *Id.*

92. See U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, ¶ 85, U.N. Doc. E/CN.4/1996/53/Add.1 (Jan. 4, 1996) [hereinafter *Violence Against Women*].

93. *Japanese Schools Reject Textbook*, BBC NEWS, Jul. 17, 2001, <http://news.bbc.co.uk/2/hi/asia-pacific/1443233.stm>.

94. See YOSHIKAWA, *supra* note 31, at 25-26.

women in conquered nations by Japanese soldiers, and Unit 731's medical experiments.⁹⁵ Indirection and euphemism ruled. During the war, when Japanese forces retreated, the Imperial General Headquarters reported the retreats using an invented word with an upside-down meaning, "*tenshin*," which means to turn and advance.⁹⁶ Likewise, when a textbook writer wrote about "Japanese aggression in China" (*shinryaku*), the Ministry censors, in the face of Chinese protests, substituted "Japanese advance into China" (*shinshutsu*).⁹⁷

As explained above, Japan has seemingly paid no price for its acts and has received no criticism from its most important ally, the United States, for failing to come to terms with its past. Although the United States may have been able to exert leverage in this area, it has not chosen to do so.

Japan's failure to confront its past is consistent with the U.S. "strategy" to not create sympathy for Japan's victims. It has also been, however, underpinned by Japan's own cultural and psychological constructs. A number of scholars have identified the differences between Germany's Christian-based "guilt culture" and Japan's "shame culture" as the defining lines showing the opposite ways in which the two have thought about their wartime victims.⁹⁸

According to some scholars, Japanese society is fundamentally group-oriented, hierarchical, and focused on what others in society think, and European culture is more concerned with individuals, their consciences, and their moral and religious rules.⁹⁹ Under the "shame" principle, maintaining face or appearance is essential to Japanese society, and admitting failures

95. See *id.*

96. See TOSHIKAZU KASE, *JOURNEY TO THE MISSOURI* 66 (1950).

97. See Peter Berton & Joan Lachkar, Presentation at the International Biennial Conference of Sino-Japanese Relations, Japanese Atrocities During World War II: Why the Coverup and Reluctance to Offer Reparations – Some Anthropological and Psychological Explanations (Sept. 18-19, 2004).

98. See, e.g., *id.*; see generally RUTH BENEDICT, *THE CHRYSANTHEMUM AND THE SWORD: PATTERNS OF JAPANESE CULTURE* (1946) (providing a background of the Japanese "shame" culture); see also IAN BURUMA, *THE WAGES OF GUILT: MEMORIES OF WAR IN GERMANY AND JAPAN* (Farrar, Straus, and Giroux 1994) (explaining the differences between Germany's "guilt" culture and Japan's "shame" culture).

99. FRED JANDT, *AN INTRODUCTION TO INTERCULTURAL COMMUNICATION: IDENTITIES IN A GLOBAL COMMUNITY* 167 (6th ed. 2010).

or crimes brings shame to the entire group.¹⁰⁰ Japan also values its dependence on stronger entities; in this case, the United States. When expectations fall short, Japanese feelings of group victimization become strong.¹⁰¹

The Japanese interpretation of several events towards the end of the war reinforced Japan's sense of victimization. According to Peter Berton and Joan Lachkar, part of the reason the Japanese have refused to acknowledge their aggression and war crimes is because the Japanese believe that several events towards the end of the war transformed them into victims rather than aggressors.¹⁰² When the first atomic bombs were dropped, many Japanese were convinced that dropping the bomb was racially motivated because it was not used on Germany, which is known as a "white" nation.¹⁰³ Of course, the reality is that the United States first successfully tested the atomic bomb on July 16, 1945, more than two months after Germany had capitulated on May 8.¹⁰⁴

Japan's feelings of victimization were reinforced by the Soviet Union's declaration of war against Japan in 1945, despite the Soviet Union's neutrality pact with Japan.¹⁰⁵ During the post-war period, the Soviet Union occupied four small islands off the shore of Hokkaido and exploited Japanese POWs in labor camps in Siberia.¹⁰⁶ Some Japanese believe that the Soviet Union's actions justified ignoring the Nanking Massacre and the attack on Pearl Harbor, instead focusing on Hiroshima and Nagasaki.

This is not to suggest that some Japanese do not want to make reparations. Making such reparations may help Japan come to

100. See MICHAEL KRYZANEK, *COMPARATIVE POLITICS: A POLICY APPROACH* 222 (2008).

101. See DAVID MACDONALD, *IDENTITY POLITICS IN THE AGE OF GENOCIDE: THE HOLOCAUST AND HISTORICAL REPRESENTATION* 161-63 (2008).

102. See Berton & Lachkar, *supra* note 97.

103. See MACDONALD, *supra* note 101.

104. Barry A. Fisher, Partner, Fleishman & Fisher, Address at the Columbia University International Academic Symposium: Yasukuni Shrine: Typhoon's Eye of Japan's Spiritual/Political Storm Rejecting Wartime Victim Redress (Nov. 8, 2007) (transcript available at <http://www.duke.edu/~myhan/kaf0704.pdf>) [hereinafter *Yasukuni Shrine*].

105. See Tsuyoshi Hasegawa, *Japanese Perceptions of the Soviet Union and Russia in the Postwar Period*, in *JAPAN AND RUSSIA: THE TORTUOUS PATH TO NORMALIZATION, 1949-1999* 281, 292 (Gilbert Rozman ed., 2000).

106. *JAPAN'S DIVERSITY DILEMMAS: ETHNICITY, CITIZENSHIP, AND EDUCATION* 25 (Soo Im Lee et al. eds., 2006).

terms with its shame. To own up to one's sins precisely means to take responsibility for past crimes. This is in direct conflict, however, with Japan's group ideology, and may destroy the image of the collective group's fantasy of the public self. The Japanese have defended against these painful, intolerable affects by taking on the role of a victim, the "little brother" to the U.S., to ward off recriminations via the process of projective identification as a collective group defense.

VII. CONCLUSION

The Comfort Women case and other cases on behalf of Japan's wartime victims were integral components of an international redress movement involving individuals and lawyers in many countries. The movement continues to be active and includes: mass demonstrations, victim and support group activism, major academic public conferences in several countries, war crimes trials, books and films, U.N. and Internet petitions (including a 42 million signature petition against Japan's bid for a permanent seat on the U.N. Security Council until it resolves its victim issues),¹⁰⁷ as well as findings and reports by special rapporteurs. The movement also involves resolutions passed by the U.N. High Commission on Human Rights,¹⁰⁸ the International Labor Organization,¹⁰⁹ and Congress.¹¹⁰ This resolution demands that Japan acknowledge, apologize, and accept historical responsibility for its massive system of wartime sexual slavery.¹¹¹ Resolution 121 was followed

107. *Protecting the Human Rights of Comfort Women: Hearing Before the House Subcomm. on Asia, the Pacific, and the Global Environment*, 110th Cong. (2007) (statement of Ok Cha Soh, Ph. D.), available at <http://www.internationalrelations.house.gov/110/soh021507.htm>.

108. See, e.g., *Violence Against Women*, *supra* note 92, ¶¶ 8-22; U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination and Prot. of Minorities, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict*, Appendix, U.N. Doc. E/CN.4/Sub.2/1998/13/ (June 22, 1998) (analyzing the legal liability of Japan for "comfort women stations" during World War II).

109. See Int'l Labour Org., Committee of Experts on the Application of Conventions and Recommendations [CEACR], *Individual Observation Concerning Convention No. 29, Forced Labour, 1930 Japan* 1-3 (1997).

110. H.R. Res. 121, 110th Cong. (2007) (demanding that Japan acknowledge, apologize, and accept historical responsibility for the sexual slavery of women during World War II).

111. See generally DAI SIL KIM-GIBSON, *SILENCE BROKEN: KOREAN COMFORT WOMEN* (1999) (recounting personal stories of Korean women used as sex-slaves by the

by the enactment of resolutions in the Dutch Parliament on November 10, 2007,¹¹² the Canadian Parliament on November 28, 2007,¹¹³ the European Parliament on December 13, 2007,¹¹⁴ the Philippines Foreign Affairs Committee on March 11, 2008,¹¹⁵ and the South Korean Assembly on October 27, 2008.¹¹⁶ More resolutions will continue to be introduced in the legislatures of other countries, and the passage of these bills will help boost initiatives by legislators in Japan.

The Comfort Women issue has led China and North Korea to become active participants in the redress movement, and to open new doors of communication and cooperation with South Korea in the last five years.¹¹⁷ The efforts of China and North Korea have raised the historical and political consciousness of public officials and citizens worldwide. This external pressure, combined with the past crescendo of criticisms and demands going on inside of Japan, may force the release of Japan's shame in order to bring about action that will allow it to move forward in the twenty-first century.

Japanese during World War II). Ms. Kim-Gibson has also made a commendable feature-length film on the subject in *SILENCE BROKEN: KOREAN COMFORT WOMEN* (Dai Sil Productions 1999).

112. People's Daily Online, *Dutch Parliament to Urge Japan to Compensate "Comfort Women"* (Nov. 10, 2007), <http://english.people.com.cn/90001/90777/6300125.html>.

113. Can., *Journal of the House of Commons*, vol. 26 (Nov. 28, 2007) at Motions (demanding that Japan acknowledge, apologize, and accept responsibility for the sexual slavery of women during World War II), available at <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3137034&Language=E&Mode=2&Parl=39&Ses=2>.

114. Resolution on Justice for the "Comfort Women" (Sex Slaves in Asia Before and During World War II), EUR. PARL. DOC. P6_TA(2007)0632 (2007), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0632+0+DOC+XML+V0//EN>.

115. Press Release, Comm. Affairs Dep't, Cttee [sic] adopts resolution addressing plight of 'comfort women?' [sic] (Mar. 12, 2008) (Phil.) available at http://www.congress.gov.ph/committees/commnews/commnews_det.php?newsid=907.

116. Kim Sue-Young, *National Assembly Urges Japan to Apologize to 'Comfort Women'*, THE KOREA TIMES, Oct. 27, 2008, available at http://www.koreatimes.co.kr/www/news/nation/2008/10/116_33365.html.

117. See generally Nicola Piper, *supra* note 3, at 163 (pointing out new avenues being used to recognize the exploitation of "comfort women").